

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In the matter of:)
)
MATTHEW A. JENKINS,) Case No. 12-50413
)
Debtor.)

—

JAMES T. WARD, Trustee,)
Plaintiff,)
v.) Adv. No. 12-05033
DIANNA LEE JENKINS,)
Defendant.)

—

JAMES T. WARD, SR., et al.)
Plaintiffs,)
v.) Adv. No. 12-03223
MATTHEW A. JENKINS,)
Defendant.)

Charlotte, NC
February 27, 2013, 11:01 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LAURA T. BEYER
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

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1 (CALL TO ORDER)

2 THE COURT: All right. We are here for the eleven
3 o'clock matters in the Jenkins case, the Ward versus Jenkins,
4 adversary proceeding 12-3223, as well as the continued pretrial
5 conference in the other Ward versus Jenkins, adversary 12-5033.
6 And I believe, by consent of the parties, the pretrial
7 conferences have been continued to March 13.

8 MS. WRIGHT: Your Honor, it is not clear to me whether
9 both the pretrial conferences were continued or just the one in
10 the case where Ms. Simpson and I have sued the debtor. With
11 respect to the 12-5033, I believe it is, that is Ms. Jenkins.

12 THE COURT: Right.

13 MS. WRIGHT: The court's summary judgment, order and
14 judgment is on appeal and there is one remaining issue and that
15 is insolvency to be decided by the court. I am wondering if we
16 could not just somehow put that one on hold until we have a
17 decision in the appeal. I mean, it just seems - we may not
18 need to go forward with proving up insolvency.

19 THE COURT: Right. I guess the only other question I
20 have is - and I did not see the chain of e-mails, so I don't
21 know whether or not it was their intention for that one to be
22 continued to March 13 or not.

23 MS. WRIGHT: That's right and, as I recall the chain
24 of e-mails, it was about this case but, as just a caution, it
25 might be better to continue both of them.

1 THE COURT: I think that's what we will do. Out of an
2 abundance of caution, I will continue the pretrial conference
3 in the adversary proceeding 12-5033 until March 13. Having
4 said that, I don't disagree with what you suggested, Ms.
5 Wright, so in all likelihood, that is exactly what will happen
6 that day.

7 MS. WRIGHT: Okay. Thank you, Your Honor.

8 THE COURT: You are welcome. So that otherwise leaves
9 us - now, the other pretrial conference was consensually
10 continued to March 13, so that leaves us with the hearing on
11 the plaintiff's motion for summary judgment, and I will note
12 for the record that Mr. Jenkins is not present in the courtroom
13 today for the hearing.

14 So, all right.

15 MS. WRIGHT: Thank you, Your Honor, and I apologize,
16 I didn't introduce myself and I didn't introduce Mr. Ward.

17 THE COURT: I didn't give you a second to. I probably
18 cut you off. Go ahead.

19 MS. WRIGHT: Cotten Wright, Grier, Furr & Crisp, here
20 on behalf of the trustee, Mr. Ward, and Mr. Ward is with me in
21 the courtroom.

22 MS. SIMPSON: Linda Simpson, Bankruptcy Administrator.

23 THE COURT: Okay.

24 MS. WRIGHT: Your Honor, this is the motion by the
25 plaintiffs for summary judgment in the discharge adversary

1 proceeding that we brought against Mr. Jenkins. We filed our
2 motion for summary judgment on January 22nd and the debtor
3 responded and we filed a reply brief.

4 The debtor's response raised an issue about the
5 timeliness of the complaint. I think we probably need to deal
6 with that before we go any further. He questioned the
7 timeliness of the complaint. First of all, he questioned the
8 court's authority to extend the deadline to object to
9 discharge. He cites to the wrong rule. He cites to the rule
10 with respect to 523 actions and objections to discharge rather
11 than Rule 4004 which clearly allows bankruptcy judges to enter
12 orders extending a deadline to object to discharge.

13 In this case, on July 2nd, the court had ordered the
14 debtor to appear at a continued meeting of creditors and also,
15 on July 2nd, the court entered an order extending the deadline
16 to sixty days after the meeting of creditors has been adjourned
17 and that's a quote, has been adjourned.

18 When the debtor didn't appear on July 11th for a
19 continued meeting of creditors, the court will recall that he
20 was found in contempt but permitted to purge that contempt by
21 appearing at a subsequent date and the debtor did appear for a
22 continued creditors meeting on July 19, 2012.

23 In his objection, the debtor argues that the
24 plaintiffs were required to seek an additional extension after
25 the second meeting of creditors. We believe he is wrong about

1 that because we stated on the record that we were not
2 concluding the meeting on July 19th and that I was going to -
3 I stated on the record that I was going to be speaking with the
4 trustee and, if the trustee determines we can adjourn the
5 meeting, we will file a notice of that but officially the
6 meeting was continued, and we have submitted a page from that
7 transcript with our reply.

8 Also on July 19th, I sent to Mr. Badger an e-mail
9 noting that the creditors meeting and unfortunately I left out
10 a word, was not adjourned. I left out the word "not," but I
11 believe the context is clear because it continued to say but
12 rather continued pending Mr. Jenkins' production of the
13 requested documents and the trustee's decision to adjourn the
14 meeting.

15 There has never been anything posted on the docket
16 saying that the meeting has been concluded, the creditors
17 meeting has been concluded or adjourned or anything of that
18 nature.

19 Now, on August 7, 2012, I did report on the record
20 that the debtor had substantially complied with the court's
21 order to appear at the continued creditors meeting but that
22 text entry doesn't reference an adjournment; it doesn't
23 reference a conclusion and in fact it was neither. It does not
24 state that.

25 So as of the date of the complaint, September 26,

1 2012, there had been no entry on the docket, no notice to the
2 debtor that the creditors meeting had been closed out and so
3 therefore the sixty-day period provided for in the court's July
4 2nd order had not run as of the date that this adversary
5 proceeding was filed, and we believe that the complaint was
6 timely.

7 THE COURT: And I will cut you off, Ms. Wright, there,
8 too, and agree with you. I did review, and I did not say this
9 earlier, your, the plaintiffs, both plaintiffs' brief in
10 support of the motion for summary judgment, as well as the
11 debtor's opposition to the trustee's motion and then again the
12 plaintiff's reply to the debtor's opposition. I did note in
13 the debtor's opposition that he had raised that issue, which
14 frankly gave me some concern when I saw that. I went back
15 through the record, just as you did, and then I saw that in
16 your reply; but I agree with what you just said. I believe
17 that the trustee's complaint was timely filed.

18 First of all, clearly the court had the authority to
19 extend the deadline to object to dischargeability and discharge
20 under Rule 4004. The court did in fact enter an order on July
21 2nd extending the deadline to object to dischargeability until
22 sixty days after the 341 meeting is adjourned. As you said,
23 that was the language from the order.

24 And I will note for the record, just as the debtor is
25 not here today to defend against this motion for summary

1 judgment, and I went back and reviewed the docket, the debtor
2 did not respond to the trustee's motion to extend that deadline
3 and raised no objection to it, and the order was entered and it
4 says what it says.

5 Then the debtor failed - you know, the debtor in part
6 created this mess by failing to appear at the 341 meetings.
7 Then we had the continued 341 on July 19th, at which the debtor
8 appeared by phone. I reviewed the transcript and your reply
9 and it specifically provided that the meeting was continued and
10 not adjourned and it would be pending basically the trustee's
11 decision as to adjourning that meeting.

12 In any event, the complaint was filed on September 26th
13 and at which point the 341 meeting still was not adjourned. So
14 I think that the complaint was, and I find that the complaint
15 was timely filed but I do agree with you, I think that's a
16 point that needed to be addressed at the outset.

17 So with that, we can turn our attention to the
18 underlying motion for summary judgment.

19 MS. WRIGHT: Thank you, Your Honor. I appreciate
20 that.

21 Turning to the substance of the motion, we believe
22 that the debtor's bankruptcy papers are substantially
23 incomplete even though they have been amended multiple times.
24 For one thing, they don't disclose transfers of the debtor's
25 property that occurred within two years of the petition date.

1 Those transfers are well documented in the documents that we
2 have and actually admitted to by both the debtor and the
3 transferee, his wife, Dianna Jenkins.

4 The debtor has admitted to transferring those funds
5 also within one year of the bankruptcy filing and subsequent to
6 entry of judgment against him by Federated Financial - on
7 behalf of Federated Financial Corporation of America. And so
8 we think that his actions, when layered against the transfers
9 and what was going on in the Federated matter, clearly show at
10 least an intent to delay, if not hinder and defraud,
11 Federated's collection efforts.

12 And alternatively we have also brought a claim with
13 respect to the debtor's failure to provide records with respect
14 to his assets and his lawsuits that he listed, potential
15 lawsuits that he listed on his bankruptcy papers. And of
16 course entry of judgment in favor of the plaintiffs as to any
17 one of those claims will completely resolve this discharge
18 proceeding.

19 Just going back over the facts briefly, outside of the
20 two-year window prepetition, we see that on March 16, 2010,
21 Federated Financial Corporation of America was awarded judgment
22 against the debtor in Wake County Superior Court and we have
23 attached a copy of that judgment to our brief.

24 On March 31, the debtor filed a motion to set aside
25 that judgment.

1 Within the two-year window prepetition, on June 29th,
2 the trial court in the Federated matter denied the debtor's
3 motion to set aside and, a month later, July 28th, the debtor
4 filed an appeal with respect to that order by the trial court.

5 On December 1st, the debtor agreed to pay Mr. LeLiever,
6 his prepetition litigation attorney, a flat fee of twenty-five
7 thousand dollars to pursue an appeal of the Federated judgment.
8 On February 25, 2011, the debtor was ordered to produce
9 documents to Federated relative to the debtor's assets and,
10 again, all of these appear as exhibits to either our brief or
11 our reply brief.

12 April 1, 2011, the debtor signed another flat free
13 agreement with Mr. LeLiever agreeing to pay him an additional
14 fifteen thousand dollars to pursue an appeal of the order
15 requiring the debtor to turn over documents relating to his
16 assets.

17 Within one year of the petition date - and during that
18 period, Your Honor - I will go back a step - during that period
19 there were transfers, regular transfers to Dianna Jenkins of
20 any lawsuit proceeds that the debtor was awarded in his
21 litigations, various litigation matters.

22 On September 6, 2011, the North Carolina Court of
23 Appeals issued its opinion affirming the denial of a motion to
24 set aside the Federated judgment.

25 February 21st, just a couple weeks later, the debtor

1 filed a complaint against Federated in the United States
2 District Court alleging that Federated and its lawyer had
3 violated consumer protection statutes. A copy of that
4 complaint was attached to our reply brief.

5 On January 17, 2012, the Court of Appeals affirmed the
6 order requiring the debtor to produce documents. And on April
7 10, 2012, Judge Stephens of the Wake County Superior Court
8 entered an order requiring the debtor to appear before the
9 court on April 12 and bring with him - this is a quote - "bring
10 with him all records from his wife's bank account and any other
11 bank account he has deposited funds to since January 1, 2008,"
12 end quote, and that is Exhibit "B" to our brief.

13 The debtor testified at the 341 meeting on May 14th
14 that his lawyer, Mr. LeLiever, offered a payment plan to
15 Federated's attorney, Jon Player, on April 10th, the same day
16 as the entry of Judge Stephens' order, and with the
17 accompanying promise that the debtor would file bankruptcy if
18 Federated refused to agree to a payment plan.

19 Now, both the debtor and Mr. LeLiever have filed
20 declarations or at least the debtor has attached declarations
21 to his reply or response, rather, stating that the debtor did
22 intend to pay Federated and that LeLiever had made numerous
23 offers to Federated through its attorney, Jon Player.

24 I would note for the court that Jon Player didn't
25 become involved with the Federated matter until after September

1 21, 2011, when the debtor sued Federated in the United States
2 District Court. Mr. Player represented Federated in that
3 action.

4 So it was at least a year and a half after entry of
5 the Federated judgment that any approach, from what we can
6 tell, any approach would have been made to Federated with
7 respect to a payment plan.

8 Now, we don't have any documentation of these
9 representations of a payment plan. We have no e-mails. We
10 have no letters. We have no copies of checks that were
11 tendered and returned. We have nothing other than Mr.
12 Leliever's statement that he had offered a payment plan to Jon
13 Player and the debtor's statement that numerous offers had been
14 made to Federated of a payment plan.

15 So on April 11 of 2012, the debtor filed his bare
16 bones petition. Now, we have attached our Exhibit "P" to our
17 brief which it is a spreadsheet that was created by my firm
18 that shows that, throughout the two years before the petition
19 date, the debtor was transferring funds to Dianna Jenkins and,
20 as a matter of fact, he transferred more than two hundred and
21 twenty thousand dollars and he has admitted that those deposits
22 went to Dianna Jenkins' bank accounts.

23 In the year before the petition date, the transfers by
24 our calculations, based on review of Ms. Jenkins' bank
25 statements from both of her accounts, as well as review of

1 information obtained from Mr. LeLiever and Mr. Norman, the
2 debtor's other prepetition litigation lawyer, we believe that
3 the transfers in the year before the petition date total sixty-
4 four thousand, five hundred and sixty-six dollars.

5 After the petition date, the debtor instructed Mr.
6 LeLiever to transfer to Dianna Jenkins seven hundred and
7 fifteen dollars and seventy cents that was remaining in Mr.
8 LeLiever's trust account. In fact, Mr. LeLiever did cut a
9 check to Dianna Jenkins for that. So there was a post-petition
10 transfer.

11 On April 24, 2012, the debtor filed his bankruptcy
12 papers. In those bankruptcy papers, he scheduled a claim for
13 Federated at forty thousand dollars, as well as claims from the
14 IRS and the North Carolina Department of Revenue.

15 In his statement of financial affairs, the debtor
16 indicated that he had received no income from employment in the
17 two years before the petition date but that he had received two
18 hundred and thirty-five thousand, two hundred and seventy-eight
19 dollars in lawsuit proceeds within that time frame. None of
20 the debtor's prepetition transfers to his wife are listed on
21 the debtor's statement of financial affairs. No transfers to
22 any third parties were listed on the debtor's statement of
23 financial affairs. No payments to creditors were disclosed
24 within the ninety days before the petition date, although
25 LeLiever's trust records show that payments of four thousand,

1 six hundred and forty dollars and three thousand, two hundred
2 and twenty-five dollars respectively were made to LeLiever and
3 Don Kovalesski, the paralegal, during that ninety-day period.

4 The debtor's schedules don't indicate that he held any
5 interest in any checking accounts or any funds held in Dianna
6 Jenkins' checking accounts for the debtor's benefit, and the
7 debtor's schedules also don't reflect any kind of household
8 creditors or the kinds of things that we would - the kind of
9 obligations that we would normally see on a consumer debtor's
10 bankruptcy papers.

11 On April 30, 2012, the debtor amended his papers. He
12 added to Schedule-F a claim for Mr. LeLiever in the amount of
13 ninety-seven thousand, five hundred dollars. He also scheduled
14 five thousand dollars in lawsuit proceeds on his Schedule-B
15 that were being held by LeLiever and claimed an exemption in
16 those funds in an amended Schedule-C.

17 Meanwhile, in compliance with this court's orders, Ms.
18 Jenkins turned over bank statements for her accounts at BB&T
19 and Wells Fargo Bank and, along the way, we received
20 documentation from Mr. LeLiever as to various settlements of
21 the debtor's lawsuits, records on Mr. LeLiever's trust accounts
22 and copies of checks issued to Dianna Jenkins for lawsuit
23 proceeds. We also obtained records from Mr. Blake Norman on
24 his trust account relative to disbursement of lawsuit proceeds.

25 On May 14, 2012, the debtor testified at his first

1 meeting of creditors that his lawsuit proceeds were deposited
2 to his wife's bank account.

3 On July 19, 2012, during the continued meeting of
4 creditors, the debtor testified that he had not disclosed the
5 account at BB&T to which most of the lawsuit proceeds have been
6 deposited because that account, quote/unquote, doesn't belong
7 to him and that he is, quote, just an authorized user, end
8 quote.

9 The debtor testified that he had access to the funds
10 transferred to Dianna Jenkins' Wells Fargo account through
11 permissive use of her ATM card and that he wrote checks on the
12 BB&T account and made withdrawals from that account.

13 The debtor also testified that he directed LeLiever to
14 transfer the funds remaining in LeLiever's trust account post-
15 petition to Dianna Jenkins after the petition date.

16 On July 24, 2012, Dianna Jenkins e-mailed
17 correspondence from BB&T to me confirming that the debtor was
18 in fact an authorized user and not an account owner of Ms.
19 Jenkins' account at BB&T.

20 On July 25, in response to a request made at the
21 continued creditors meeting, the debtor e-mailed a summary of
22 his net lawsuit proceeds and showed a total of two hundred and
23 twenty-six thousand, thirty-one dollars and thirty-three cents.

24 The debtor stated that the transfers to Dianna Jenkins
25 did not reflect any payment, quote, for any goods or services,

1 end quote, or for any extensions of credit or money loaned. In
2 other words, those transfers were made without consideration.

3 Instead, the debtor alleged the transfers to Dianna
4 Jenkins were merely a conduit to deposit funds to the marital
5 account and that he did not lose ownership of the lawsuit
6 proceeds that were transferred.

7 On August 29, 2012, Dianna Jenkins sent the trustee's
8 lawyer an e-mail stating that, quote, "It was Mr. Jenkins, not
9 me, who spent his proceeds by writing checks and making ATM
10 withdrawals as the bank record shows."

11 Ms. Jenkins also denied being a recipient of any
12 transfer.

13 Now, this statement of Ms. Jenkins is contradicted by
14 a review of Ms. Jenkins' bank statements. We haven't raised
15 this in our papers but the bank statements that were filed with
16 our brief on the BB&T account shows that a deposit of lawsuit
17 proceeds would be made and they would be immediately followed
18 with online payments to Duke Energy, Chase Credit Card, Time
19 Warner Cable and the like.

20 Now, Mr. Jenkins has told us on his bankruptcy papers
21 he is not responsible for those kinds of household obligations,
22 but those obligations were being paid immediately after a
23 deposit of lawsuit proceeds. So whether Ms. Jenkins did or did
24 not spend any of the lawsuit proceeds, that's not really at
25 issue here.

1 On September 14, 2012, the debtor amended his
2 bankruptcy papers again and he reduced the claim scheduled for
3 Mr. LeLiever to fifty-six thousand, five hundred dollars. He
4 also reduced the amount of lawsuit proceeds that he had
5 received on his SOFA to that two hundred and twenty-six
6 thousand dollar figure that he had given to me several weeks
7 earlier.

8 On October 19, 2012, the debtor amended his papers
9 again and this time he disclosed the seven hundred and fifteen
10 dollars and seventy cents that was being held by Mr. Leliever
11 as of the petition date that was transferred post-petition.

12 So despite the debtor's three amendments to his
13 bankruptcy papers, he didn't disclose any transfers of the
14 lawsuit proceeds to Dianna Jenkins; he didn't disclose any
15 transfer of lawsuit proceeds to anybody. He didn't disclose
16 any interest in funds held in Dianna Jenkins' bank account or
17 any payments to creditors that may have been made in the ninety
18 days before the petition date or any payments or transfers at
19 all that were made outside the ordinary course of business. He
20 didn't disclose professional fees paid to LeLiever and
21 Kovaleski, in particular, and we know that those payments were
22 made in the ninety days before the petition date. It didn't
23 list any household creditors and the like.

24 Now, the version of the facts recited by the debtor
25 are a matter of record both in this case and in the Federated

1 matter but the debtor has attempted to raise a dispute as to
2 certain facts that are on the record.

3 In the debtor's response to facts filed with his
4 objection, he denies transferring funds to his wife. He denies
5 that his bankruptcy papers are substantially incomplete. He
6 denies that he failed to keep records relevant to his assets,
7 liabilities or financial condition, and he denies and disputes
8 that he did not attempt to satisfy the Federated judgment.

9 In his objection, he states that he deposited his
10 lawsuit proceeds to his wife's account in the ordinary course
11 of business. He argues that the transfers to his wife were
12 not, quote, absolute, end quote, because he maintained control
13 over those funds.

14 The debtor states that he had spent all of the lawsuit
15 proceeds by the time of the petition date. He also
16 recharacterizes his testimony at the May 14, 2012, meeting of
17 creditors, arguing that what he really meant to say was that he
18 only had one creditor.

19 Now, that's understandable. Sometimes one says
20 something that comes out differently, appears differently than
21 what one meant when it is printed on a transcript but, at any
22 rate, the quote that we put in our papers was accurate based on
23 the transcript.

24 The debtor also argues that LeLiever and Kovalski
25 were not creditors because they received contemporaneous

1 payments, so he didn't have to make those disclosures of
2 payments of fees.

3 Your Honor, those are the facts. We have got three
4 causes of action. We think two of them are equally strong and
5 I will go through those two first and then we will talk about
6 the third.

7 The application of the law to the material
8 uncontroverted facts that are shown in the record and papers
9 that we filed with our brief and our reply brief show that the
10 debtor's discharge should be denied pursuant to 727(a)(2)
11 because the debtor, with intent to hinder and delay or defraud
12 a creditor of the estate, has transferred, removed, destroyed,
13 mutilated or concealed or has permitted to be transferred,
14 removed, destroyed, mutilated or concealed property of the
15 debtor within one year before the date of the petition and, in
16 this case, property of the debtor after the date of the filing
17 of the petition.

18 The elements that have to be established pursuant to
19 727(a)(2)(A) are that, within one year of the petition date,
20 the debtor transferred or concealed the debtor's property with
21 intent within a year before the date of the petition.

22 The elements that have to be shown with respect to
23 727(a)(2)(B) are substantially the same except that we have to
24 show a transfer after the petition date.

25 Now, the debtor has denied that any, quote, transfers

1 of his lawsuit proceeds were made to Dianna Jenkins but the
2 documentary evidence is overwhelming in the other direction.
3 The debtor has admitted that the lawsuit proceeds were
4 deposited to his wife's bank accounts both before and after the
5 petition date. The documentary evidence shows that the debtor
6 wasn't an owner of either one of those accounts, and the
7 definition of the term "transfer" was specifically drafted so
8 as to include deposits to bank accounts. We have talked about
9 that earlier, I believe in Dianna Jenkins' bankruptcy case, and
10 we have cited to the legislative history in our papers.

11 The debtor bases his argument that no transfers were
12 made on the fact that he continued to have access to and to
13 spend the lawsuit proceeds but, because title to the lawsuit
14 proceeds was in fact transferred to Dianna Jenkins' name when
15 the checks for those funds were made payable to her and
16 deposited to her bank accounts, the transfers were absolute.
17 The admission that the debtor continued to have access to the
18 funds supports the conclusions that the transfers were in fact
19 fraudulent.

20 For these reasons, the debtor's argument that the
21 checks made payable to and deposited to Dianna Jenkins' bank
22 accounts were not transfers fails.

23 The debtor has not argued that the lawsuit proceeds
24 did not reflect his property, so we have met that element of
25 the statute.

1 As for the fourth element under (a) (2) (A), the
2 documentary evidence shows again that there was in excess of
3 sixty-four thousand dollars transferred to Dianna Jenkins
4 before the petition date and, with respect to (a) (2) (B), that
5 there was seven hundred and fifteen dollars transferred after
6 the petition date.

7 The third element, the element of intent is where the
8 debtor has raised the biggest argument in his response. He
9 denies he had any such intent to hinder, delay or defraud
10 Federated and he again attached a couple of affidavits, one
11 from himself and one from Mr. LeLiever, as proof of that.

12 The court, of course, has to weigh that evidence in
13 those affidavits that, again, are unsupported, against the
14 analysis of the badges of fraud as reflected in the debtor's
15 actual behavior.

16 As explained by the Fourth Circuit, the court is
17 permitted to draw inferences from the application of the badges
18 of fraud to the facts and circumstances of the debtor's case.
19 There are seven badges that have been laid out by the Middle
20 District Bankruptcy Court in the *Arnold* case and those include
21 a family relationship; the debtor's retention of benefit or use
22 of the property; the lack or inadequacy of consideration; the
23 debtor's financial condition before and after the transfer; the
24 existence of a cumulative effect of the pattern or series of
25 transactions or course of conduct after incurring the debt or

1 the onset of financial difficulties or the pendency of a suit;
2 the general chronology of the events and transactions under
3 inquiry; the debtor's attempt to keep the transfer a secret;
4 and the proximity of the transfer to the debtor's bankruptcy
5 filing.

6 Of course, 727(a)(2) is phrased in the disjunctive, so
7 we need to either show an intent either to hinder, or delay, or
8 defraud. We don't have to show all three. But application of
9 the badges of fraud here clearly weighs in favor of denial of
10 discharge. The debtor has acknowledged that his lawsuit
11 proceeds were deposited to his wife's checking account. He has
12 stated affirmatively that he continued to access the lawsuit
13 proceeds after those transfers were made. He has stated
14 affirmatively that the transfers were not made for any
15 consideration.

16 The lawsuit proceeds totaling sixty-four thousand,
17 five hundred and sixty-six dollars were transferred within a
18 year and again - I will get to that later. The general
19 chronology of events and transactions shows that, during the
20 year before the petition date, the debtor resisted Federated's
21 discovery efforts and that he actually challenged Federated's
22 collection efforts by filing the lawsuit against them in the
23 United States District Court.

24 The debtor did not produce Dianna Jenkins' bank
25 statements to Federated. Instead he filed bankruptcy after

1 being ordered to produce those bank statements to Federated.

2 The debtor refused to disclose the transfers in his
3 bankruptcy papers after he had filed bankruptcy and the
4 prepetition transfers to Dianna Jenkins continued until about
5 two weeks before the petition date and, after the petition,
6 there was that one transfer of seven hundred and fifteen
7 dollars.

8 In sum, analysis of the badges of fraud substantially
9 outweighs the unsupported affidavits by LeLiever and the
10 debtor. When you layer the debtor's actions before the
11 petition date against the record of the transfers that were
12 made to Dianna Jenkins and the fact that the debtor has
13 acknowledged that he continued to have access to those funds,
14 it clearly shows an intent, we believe, to defraud. But if
15 nothing else, the debtor's actions show an intent to at least
16 delay Federated's collection efforts by not producing records,
17 appealing the order that required him to produce records, not
18 showing up for court on April 10th before Judge Stephens and
19 then being ordered to appear on April 12th to produce his
20 records. He obviously was playing a game of delay. The fact
21 that he sued Federated and its lawyers in September 2011 shows,
22 we believe, an intent to hinder their collection efforts.

23 So for all of these reasons, we would ask that the
24 court enter summary judgment as to our claims pursuant to
25 727(a)(2).

1 We will go on now to our claims pursuant to 727(a)(4)
2 based on false oaths. That section of the code provides that
3 a bankruptcy discharge will be denied if the debtor knowingly
4 and fraudulently or in connection with a case made a false oath
5 or account. Essentially this code section codifies the
6 principle that only the honest but unfortunate debtor is
7 entitled to a fresh start as provided through the bankruptcy
8 discharge.

9 The debtor's petitions, his schedules, his SOFA, and
10 all of the amendments thereto were executed under oath. The
11 bankruptcy code, the bankruptcy rules, the bankruptcy forms are
12 designed to ensure that complete, truthful and reliable
13 information is put forward at the outset of the proceedings so
14 that the decisions can be made by the parties-in-interest based
15 on fact rather than on fiction.

16 The trustee and the debtor's creditors are not
17 required to engage in a tug-of-war with the debtor in order to
18 pull the information out. Although the Fourth Circuit has
19 stated that a false oath must be related to a matter that is
20 material in the debtor's case, the debtor's failure to disclose
21 assets or transactions in the debtor's schedules or SOFA may be
22 sufficiently material so as to warrant denial of discharge.

23 Therefore, if the debtor's schedules and SOFA as filed
24 contain materially incorrect information, discharge should be
25 denied; and even a debtor's subsequent disclosure does not

1 expunge a prior false oath.

2 In this case, the most glaring admission from the
3 debtor's bankruptcy papers and amended bankruptcy papers was
4 his failure to disclose the transfers to Dianna Jenkins and he
5 hasn't just failed to do that, he has refused to do that.

6 The debtor has justified not disclosing those
7 transfers because he didn't pay Dianna Jenkins for goods or
8 services or for an extension of credit or money loaned,
9 therefore no payments were made to her.

10 The debtor has also alleged that those transfers were
11 made in the ordinary course of his financial affairs, and he
12 has contradicted himself by saying he was not required to
13 disclose any interest in the BB&T account because he is not an
14 owner of that account but, on the other hand, he stated that he
15 did not lose ownership or interest in the funds that were
16 transferred to Dianna Jenkins.

17 The debtor hasn't given us enough information for us
18 to be able to discern what his ordinary course of business
19 actually is. Again, he doesn't list any of the typical types
20 of creditors that would be found on a consumer debtor's
21 petition. So we have to assume that he doesn't have any of
22 those types of liabilities.

23 Moreover, the debtor and his wife have stated
24 affirmatively that the debtor spent his lawsuit proceeds
25 leading to the inference that the transfers to Dianna Jenkins'

1 bank accounts were not made for the purpose of paying household
2 expenses, although we can't be sure.

3 In any event, the debtor's amended bankruptcy papers
4 don't disclose the transfers or the debtor's continued
5 ownership in the funds and, even if we accept the debtor's
6 argument that he was not required to disclose those transfers,
7 there were no transfers to third-parties of those lawsuit
8 proceeds disclosed on the SOFA.

9 Further, among the other admissions is that the debtor
10 only listed selected creditors and those were again Federated,
11 IRS, the NC Department of Revenue and Mr. LeLiever.

12 Even though the term creditor is broadly defined, the
13 debtor has assumed that he did not need to disclose payments to
14 his legal professionals because, in the debtor's world, those
15 were contemporaneous payments and he has raised the same
16 argument with respect to utility providers and the like.

17 The debtor's multiple amendments didn't change
18 anything. Each time he signed and filed papers with the
19 bankruptcy court, he did so under oath and each time he did so,
20 he left out material omissions, so each filing reflected a
21 false oath. We know that those false oaths were not
22 inadvertent because he has told us, he has argued with us about
23 what he has to provide, what information he has to file. There
24 is nothing in the law that requires the trustee to chase down
25 a debtor and make sure that his papers are correct.

1 He has disregarded the warnings that he has received
2 both from the trustee at the May 14, 2011, creditors meeting
3 and from me at the July 19th continued creditors meeting and in
4 an e-mail that I sent to the debtor. The debtor simply knows
5 better than we do as to what is required.

6 Viewed through the lens of the debtor's history of
7 resistance to producing any financial records to Federated
8 post-petition, his - prepetition, excuse me - his post-petition
9 refusal to disclose the transfers and payments to creditors and
10 the like reflected in our view an intent to deceive by
11 withholding material information regarding his financial
12 affairs and, in particular, the disposition of his lawsuit
13 proceeds.

14 So for those reasons, we would ask that the court
15 enter summary judgment with respect to our claim pursuant to
16 727(a)(4).

17 We have a third claim, Your Honor, under 727(a)(3) and
18 this is a failure to produce records. Reading the statute, it
19 appears that a debtor is required to turn over any - rather
20 keep and preserve and turn over any recorded information.
21 Typically we will acknowledge that the way that has been
22 interpreted is that a debtor has to turn over books and
23 records, financial books and records, accounting statements and
24 that sort of thing.

25 In this case, what the debtor didn't turn over to us

1 were records related to the potential causes of action that he
2 listed in his petition and, as a matter of fact, because we
3 didn't have sufficient information, we came to the court and
4 got an order preserving those causes of action for the benefit
5 of the bankruptcy estate should the debtor decide to pursue
6 them after his case has been closed.

7 We believe that the statute would extend to cover a
8 failure to produce the types of records that relate to his
9 assets that we have requested but, again, our request under
10 727(a)(3) is an alternative request and we would ask that the
11 court enter judgment on that, as well.

12 Thank you.

13 THE COURT: All right. Ms. Simpson.

14 MS. SIMPSON: The only thing that I would just like to
15 add to that is somewhat a characterization of this debtor.
16 This is a *pro se* debtor and at times we are all sympathetic to
17 *pro se* debtors because they are unsophisticated parties. Mr.
18 Jenkins has proven before the court he is not an
19 unsophisticated party. He has made his living in the past by
20 filing lawsuits and appeals in the state and federal courts.
21 He has in fact filed *pro se* documents that evidence a
22 familiarity with the law and being able to read the law and
23 read the cases and have responsibilities under that. So I
24 don't believe this is a case of an unsophisticated debtor.

25 In fact, there are other things that on the record

1 show Mr. Jenkins has potentially abused the system in other
2 ways. As I think Your Honor will recall, there was a
3 presumption of abuse from the means test filed in court. Mr.
4 LeLiever as creditor of the debtor, the debtor's attorney and
5 his creditor, filed a motion to dismiss as the case was an
6 abusive filing and Mr. Jenkins also, *pro se*, filed a motion to
7 dismiss the case as abusive.

8 It appears, from all of his actions historically and
9 in this case, his purpose is to delay, hinder and defraud. So
10 I think Your Honor can look at what happened in the base case
11 also in support of these motions.

12 THE COURT: And I will say I agree wholeheartedly with
13 everything that you just said, Ms. Simpson, and I won't
14 reiterate all of it but, again, I will start by saying that the
15 debtor is, once again, not here today to defend against the
16 motion for summary judgment. I did review the plaintiff's
17 brief, the debtor's opposition, as well as the plaintiff's
18 reply to the debtor's opposition. The plaintiff, as stated by
19 Ms. Wright, has moved for summary judgment with respect to all
20 three causes of action in the complaint under 727(a)(2),
21 727(a)(3) and then 727(a)(4).

22 As set out by Ms. Wright, summary judgment for the
23 moving party is appropriate when there are no genuine issues of
24 material fact and the moving party is entitled to judgment as
25 a matter of law. And I find in this case it appears that there

1 are no genuine issues of material fact and that summary
2 judgment is in fact appropriate on all three causes of action
3 for all of the reasons stated in the briefs and supporting
4 documents that were filed by the plaintiffs. And I think that
5 that has all been set out in great detail in the plaintiff's
6 supporting documents, as well as the exhibits and affidavits
7 that were attached, and frankly there is no reason for me to go
8 back and reiterate all that you just said, Ms. Wright, but for
9 all of those reasons I will grant summary judgment in favor of
10 the plaintiffs and will ask you, Ms. Wright, if you would draw
11 an order and I think it should be perfectly consistent with the
12 briefs that you have already filed but if you would draw that
13 order. I don't know if you need to circulate that by Ms.
14 Simpson but then upload that for my signature, I would
15 appreciate it.

16 So I think that is it. I know this has been a lot of
17 work for you, Ms. Wright, and Mr. Ward, and I appreciate it.

18 MS. WRIGHT: Thank you, Your Honor.

19 COURTROOM DEPUTY: Does this moot the need for a
20 pretrial conference?

21 THE COURT: That will enter judgment in favor of the
22 plaintiff and it will moot the need for that pretrial
23 conference on March 13th, yes. We will otherwise have the
24 continued pretrial conference in the other adversary
25 proceeding, though, and we will -

1 MS. WRIGHT: Your Honor, do you want me to include
2 that in the order? That the need for a pretrial conference is
3 mooted?

4 THE COURT: Yes. You know, since we have granted
5 summary judgment, there is no reason to conduct a pretrial
6 conference.

7 COURTROOM DEPUTY: And what time would you like the
8 hearing to be in the other case?

9 THE COURT: 9:30 would be fine.

10 Thank you.

11 MS. WRIGHT: Thank you, Your Honor.

12 (Off the record at 11:45 a.m.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Patricia Basham

Patricia Basham, Transcriber

Date: April 3, 2013